

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO.: 2011-CA-16841-O
Jury Trial Volume IV

JOHN MAHONY and DIANE
MAHONY, as husband and wife,

Plaintiff,

-vs-

JAMIE RODRIGUEZ and MARIA
RODRIGUEZ, as husband and wife,

Defendants.

DATE TAKEN: July 30, 2014

TIME: 9:00 a.m.

PLACE: Orange County Courthouse
425 North Orange Avenue
Orlando, Florida 32801

BEFORE: Honorable Patricia Doherty

Stenographically Reported By:
Susan Mullen

APPEARANCES

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P R O C E E D I N G S

THE COURT: All right. Let's go on the record in 2011-CA-16841. Good morning, everyone.

MR. KELSKY: Good morning.

MR. SOTO: Good morning.

THE COURT: As I indicated when I took the bench, I've been told all of the jurors are present.

Is there any additional argument on the issues we heard last night?

Mr. Soto, I have given you an opportunity to review the case presented by the plaintiff, do you have any additional arguments?

MR. SOTO: Yes, Your Honor.

And it goes to superseding intervening cause, Your Honor.

THE COURT: Okay. Any additional argument regarding the other defenses?

MR. SOTO: No, Your Honor, other than the fact that their case is distinguished with Johnson and Meyer and no inspection was had in this case. Inspections were had in both of those cases, so they may be distinguishable on that ground.

I'd like to make my arguments to be probative and superseding.

THE COURT: Okay. You may.

1 MR. SOTO: Your Honor, even if the jury were to
2 find that Mr. Rodriguez did not fully disclose what he knew
3 about the balcony or about the leak in the office. The
4 legal cause could still be the handyman. For instance,
5 there may have been water because of he did or didn't
6 disclose that was on the balcony, but that could have been
7 20 years. We never know if that would have gone all the way
8 through.

9 The testimony by both Mr. Rodriguez and Mr. Edrem
10 was that the handyman broke through that balcony. We don't
11 know how long it was open for, and so that is an overrun
12 force, and could be deemed by the jury as the legal cause of
13 the damages to the balconies.

14 In addition, the office/the baby's room, where he
15 cut open part of the wall and put a fan in. Even their
16 expert said that a fan could expose mold and could not
17 determine what part of that was mold that had gotten there
18 just recently or not.

19 The jury could find that Mr. Rodriguez didn't tell
20 fully what he knew about that leak originally, but because
21 of the superseding intervening cause of the handyman opening
22 it up and blowing air into there. The jury could find that
23 that's an actual legal cause despite the fact that they find
24 that Mr. Rodriguez had not told them everything he knew in
25 compliance with Johnson.

1 THE COURT: All right. Thank you. Mr. Kelsky.

2 MR. KELSKY: The superseding and intervening cause
3 of damage by Mr. Soto is really nothing more than
4 comparative negligence type claim. Again, this is not a
5 claim of negligence representation. There is no claim for
6 negligence of misrepresentations or affirmative fraudulent
7 misrepresentation.

8 Additionally, that is a gross mischaracterization
9 of the evidence that was actually presented in this case,
10 and we specifically requested that Mr. Edrem determine what
11 did Larry Smith do to cause any damage to the home. His
12 answer was flat out none, there was no damage. And Mr.
13 Rodriguez said that he didn't know exactly what Larry Smith
14 did.

15 There's no competent substantial evidence to
16 support their claim anyway, but independent of that it's
17 still a negligence argument, and either way it's not
18 applicable to a fraudulent misrepresentation claim. And I
19 think the case we provided Your Honor yesterday to include
20 comparative fault and fraudulent misrepresentation in the
21 Meyer case is equally as applicable to the superseding
22 intervening cause defense which is a negligence based
23 defense.

24 THE COURT: All right. Well how this is in front
25 of me, it came up as part of the charge conference that was

1 done. Okay. And the issue that I'm being asked to decide
2 at this point is whether a charge will be given specifically
3 that defendants are raising defense that's superseding
4 intervening cause, so that's what I'm deciding, and also the
5 assumption of the risk.

6 So regarding the jury instruction, the way its been
7 presented by the defense, I think the plaintiffs' burden is
8 to establish the elements of this cause of action which
9 include that the allegation cause of damages, and that's
10 part of the claim.

11 The defendants are certainly entitled to defend the
12 claim on any -- on the plaintiffs' failure to meet any
13 element of their cause of action, including the causation
14 element. The issue is whether there is a special jury
15 instruction regarding causation as a defense.

16 From what I've heard at this point in the trial,
17 I'm not inclined to grant a special jury instruction that
18 their -- that the defendant has a defense of superseding
19 intervening cause. That does not prevent the defense though
20 from arguing that the allegation has not caused the
21 plaintiffs' alleged damage, but instead was caused by other
22 matters based on the evidence that's presented. So again,
23 in the context of which I'm deciding this, I don't think
24 it's appropriate to give a separate jury instruction that
25 this is a special defense. I think this defense is

1 incorporated in the denial of the claim.

2 MR. SOTO: Yes, Your Honor.

3 THE COURT: So, with that, and I'm making this
4 without prejudice. The defendant hasn't rested at this
5 point nor has -- I don't know if the plaintiff is intending
6 to present any rebuttal evidence. There's been none
7 discussed, but it's without prejudice for either party to
8 revisit the issue before the final jury instructions are
9 decided, the final verdict form is decided, and certainly
10 before it's given to the jury.

11 MR. SOTO: Yes, Your Honor.

12 THE COURT: And on the assumption of the risk, I
13 -- it would be the same ruling under the Meyer case. I
14 don't think it's appropriate to have an assumption of the
15 risk as a defense, but it doesn't prevent the defendant from
16 arguing the plaintiff hasn't met its burden by way of the
17 elements of the cause of action. Does that give you enough
18 guidance?

19 MR. KELSKY: Yes.

20 MR. SOTO: Yes, Your Honor. And I think we could
21 probably just dispose of the verdict because of your ruling.
22 Mr. Kelsky's verdict form would be appropriate. I will just
23 argue those matters as they affect the elements, and then
24 the jury will just have to make their determination as to
25 the material amount based upon that.

1 MR. KELSKY: There is another issue that's
2 relevant to what's coming up regarding the testimony of
3 Mr. Hoyos. So when we fixed the jury instructions, the
4 agreement was the measure of damages that are being met as a
5 bargain for the out-of-pocket rule, that's the measure of
6 damages.

7 Mr. Hoyos, when he gave his deposition testimony,
8 his testimony was that he was giving an opinion only as to
9 the value of the home as of July 8, 2014. And his testimony
10 -- it wasn't a very long deposition. It was a short
11 deposition, actually, the testimony doesn't establish the
12 value of the claim or the damages that existed at the time
13 of the sale. In other words, the only thing he knew was the
14 present value, it did not fix the value relative to damages.
15 In fact, he had no information about the damages. I'm
16 raising the issue now, Your Honor, because given the jury
17 instructions that were agreed to, his testimony is now
18 irrelevant and legally incompetent.

19 THE COURT: So what are you suggesting?

20 MR. KELSKY: I'm suggesting that his testimony
21 should be disallowed. May I just read the deposition line
22 that's at issue? So the question was, so in other words,
23 you're giving me today is what you believe the estimated
24 value of the house would be as of July 8, 2014? That's
25 correct. That sums up the testimony.

1 MR. SOTO: Your Honor, first, he's not limited to
2 what he said in his deposition. I can ask him additional
3 questions. What Mr. Kelsky is asking us is to strike a
4 witness at trial which is an extraordinary request at this
5 point. In addition, he can testify to those things, and I
6 can ask him right now. The fact that Mr. Kelsky didn't ask
7 Mr. Hoyos different aspects, doesn't mean I'm barred right
8 now from bringing them up. He could have asked and
9 confirmed that they weren't -- had no instances of any other
10 damages and could not delve into it.

11 MR. KELSKY: May I respond?

12 THE COURT: Quickly.

13 MR. KELSKY: First of all, I asked him if he had
14 any other opinion, and that was the opinion, and, secondly,
15 there's no way Mr. Soto could put on an expert witness and
16 ask him an opinion at trial without having them be
17 disclosed, so I don't think that argument makes sense, but
18 the reality is this is what sums up his testimony.

19 THE COURT: I'm not going to strike him. And
20 again as I stated before and I'm going to restate it, we did
21 the jury instructions, we did the charge conference. The
22 defendant has not rested, the plaintiff has not had an
23 opportunity for rebuttal, so the decision for me after last
24 night's charge conference and this morning are all about
25 prejudice for either parties to review them at the

1 conclusion of the evidence. So for that purpose I'm going
2 to deny the motion to strike.

3 MR. KELSKY: I can raise the issue when they rest.
4 I'll raise the issue after if I need to.

5 THE COURT: All right. Any other issues?

6 MR. SOTO: Your Honor, may I have a copy of this
7 new verdict form?

8 THE COURT: The one that he was going to finish
9 last night.

10 MR. KELSKY: Yes. I've got them all.

11 THE COURT: Mr. Soto, would like to see it.

12 Do either of the attorneys need a quick break
13 before we bring the jury in?

14 MR. KELSKY: When would you like the jury
15 instructions?

16 THE COURT: Hang on to them for right now.

17 Does anybody need a quick break?

18 MR. KELSKY: I'm fine.

19 THE COURT: Mr. Soto, you and your clients are
20 fine?

21 MR. SOTO: Yes, Your Honor.

22 THE COURT: Okay. Would you bring in the jury?

23 THE DEPUTY: Yes.

24 (The jury was escorted into the courtroom.)

25 THE COURT: Good morning. Please be seated.

1 Take a moment to get yourselves situated. I hope
2 everyone had a restful evening and welcome to day three of
3 the trial.

4 Let me check in with you and confirm that all of
5 the orders have been followed. If you followed my
6 instruction and did not do any research of any kind through
7 any method, please raise your hand. And all hands are
8 raised. If you followed my instructions and have not
9 discussed the case with anyone either directly or
10 indirectly, meaning in person or electronically or
11 otherwise, please raise your hands. And all hands are
12 raised. And lastly if you have become aware of anyone who
13 has violated any of these instructions, or if you have
14 overheard anyone try and talk about the case or actually
15 talk about the case in your presence, please raise your
16 hand. There are no hands raised.

17 All right. We are continuing with the defendants'
18 case. Mr. Soto, if you would call your first witness.

19 MR. SOTO: Yes, Your Honor, we call Mr. Jose
20 Hoyos.

21 THE DEPUTY: Raise your right hand to be sworn in
22 by the clerk.

23 THE CLERK: Do you swear or affirm, the testimony
24 you shall give in this matter will be the truth, the whole
25 truth, and nothing but the truth, so help you God?

1 THE WITNESS: I do.

2 THE COURT: Sir, have a seat, make yourself
3 comfortable. When you testify, please speak loudly and
4 clearly into the microphone.

5 Mr. Soto, when you're ready.

6 MR. SOTO: Thank you, Your Honor.

7 JOSE HOYOS,

8 Having first been duly sworn, was examined and
9 testified as follows:

10 DIRECT EXAMINATION

11 BY MR. SOTO:

12 Q Please state your name for the record.

13 A Jose Hoyos.

14 Q What is your occupation, Mr. Hoyos?

15 A Real estate agent.

16 Q Are you licensed in the State of Florida?

17 A Yes, I am.

18 Q How many real estate transactions have you participated
19 in?

20 A Since 2001, about 20.

21 Q How many residential?

22 A That would be 90 percent of that.

23 Q Have you ever sold a house in the area regarding the
24 subject property?

25 A In the Avalon Park Village since, no.

1 **Q In East Orlando?**

2 A I have.

3 **Q Did you review -- what did you review in order to make**
4 **your opinions established today?**

5 A The Property Radar based on the Orange County Property
6 website.

7 **Q Did you look at any other?**

8 A Also in the MLS.

9 **Q Can you please explain what the MLS is to the jury?**

10 A It's a website that's put together by the local Orlando
11 Board of Realtors where local agents will input data based on
12 listings and sales.

13 **Q Have you come up with an opinion regarding a value for**
14 **today?**

15 A Yeah. \$575,000.

16 **Q Is that opinion formed and final?**

17 A Yes, it is.

18 **Q Why did you determine it was -- the house was \$575,000?**

19 A Because of the uniqueness of the house, the
20 Mediterranean look, in that particular area it's the only house
21 like it that exists, it's 5,600 square feet, it looks like a
22 castle and somebody who wants to buy the house because they
23 really love it, they want it, they like the neighborhood, and
24 they're willing to pay \$575,000 which is about \$100,000 more
25 than the 2014 assessment by the property appraisers.

1 **Q Now why did you add \$100,000 to the property**
2 **assessment?**

3 A It's the value of the emotional approach that some
4 people say, I'm willing to pay \$100,000 to have six rooms, four
5 bathrooms, and being able to have that unique house in such a
6 great neighborhood.

7 **Q Did you find any comparables in the area?**

8 A In Village Six, no. I found one for \$575, but it was
9 not in Village Six it was on the golf course in Avalon Park, but
10 most appraisers and lenders say, you can't price a house based
11 on a different community. It has to be the same area, but if
12 somebody says, I'm willing to pay cash, what the appraised value
13 is for, the assessed value on Orange County Property Appraiser,
14 if the house is worth it, in fact that it's so lovely in that
15 community and unique, then there's a value for it.

16 **Q What role does uniqueness play in determining a value?**

17 A Well, you know, we have bought and sold homes people go
18 for either because the kind of roof it has, it has a pool, it's
19 close to the shopping centers, it's close to walk areas, it's
20 close to the road, and they're looking at location location, but
21 at the same time if it's a family and the spouse says, honey, I
22 want a six bedroom and this is my dream home, and this is what I
23 always wanted, and they're willing to pay for it, then it
24 establishes the market value, and the house is beautiful from
25 the outside.

1 **Q** If a few of the items needed to be replaced from the
2 house, such as French doors, such as fixing balconies, drywall
3 and water intrusion, how big of a factor would you say that
4 would play in changing the ultimate value of \$575,000?

5 A Myself, acting as a buyer's agent, where the buyer's
6 telling me, oh, I got to tell him what's wrong with the house,
7 then, you know, you order an inspection. And the inspection
8 says there's some repairs that need to be done, then I will tell
9 the agent that's representing the seller that, look, the
10 inspection found, say \$20,000 of repairs that need to be done.
11 My client buyers is not going to pay, you know, \$575, it has to
12 be \$20,000 less, and then I will submit the offer to the listing
13 agent, and I will submit it in the offer.

14 **Q** Let's say it was \$82,000, how would you approach that?

15 A Let's just say if it was \$82,000 worth of repairs, and
16 I am acting as a buyer's agent, then I have to be loyal and show
17 it to my client/buyer, and I have to submit it, and then my
18 client/buyer says, look, I'm not going to pay for those repairs.
19 I have to submit the offer to the listing agent deducting the
20 \$80,000. It's up to the seller and the listing agent to say yes
21 or no.

22 **Q** Would there be a subsequent negotiation regarding those
23 -- that damage in your opinion?

24 A No. It's either a yes or no.

25 **Q** Would -- have you ever participated in a sale where the

1 seller may pay for part of it and the buyer may pay for part of
2 those repairs?

3 A Yeah. It's based on what they reach. It also depends
4 on how desperate a seller is. They could say, okay, I'm willing
5 to go halfway, but it's ultimately up to the buyers.

6 Q Would uniqueness play a role in that negotiation?

7 A If it is an emotional sale, where the buyer just wants
8 that house, yes, the buyer may go, I'm willing to allow let's
9 say half of the cost, and I'll deal with the rest because I just
10 love this house.

11 Q Let's talk about the value at the time of the sale.
12 What would be determined, and you could give a range for an
13 exact amount, if the \$82,000 in damages was true at the time of
14 the sale, what do you think the ultimate value would be?

15 A If it was sold for \$560,000, if there are damages, it
16 could be about \$450,000.

17 Q Could it have been more?

18 A Can you repeat the question?

19 Q Could the ultimate value have been more?

20 A If it was negotiated between the parties, yes.

21 Q What about turning to today, the actual value today
22 that you testified was \$575, there were those \$82,000 in damages
23 back then, what effect would that have on the current value?

24 A If there were damages, it will make the value go down
25 based on the inspection on the house, but, you know, if the

1 house could not be sold with damages, it would ultimately affect
2 the value, yes.

3 Q What if those damages were repaired what effect would
4 that have on the current actual value?

5 A It will stay the same. The value will stay the same
6 because the repairs were fixed.

7 MR. SOTO: No further questions.

8 THE COURT: Cross-examination.

9 CROSS-EXAMINATION

10 BY MR. KELSKY:

11 Q I want to make sure I understood your testimony, if the
12 house had \$83,000 in damages in fact at the time of the sale, it
13 is your opinion that the real value of the property would have
14 been \$450,000; is that correct?

15 A That's correct.

16 Q And that takes into account at the time of the sale
17 there was about \$83,000 worth of damage; is that right?

18 A Based on the inspection report, yes.

19 Q For getting an inspection report, if there were \$83,000
20 in damages, the real value of the home would have been \$450,000,
21 correct, that was your testimony, wasn't it?

22 A Yes.

23 Q You were asked in this case to provide an opinion as to
24 the value of the home today in July of 2014; is that correct?

25 A That's correct.

1 Q Do you know how much money the Mahonys paid to repair
2 the home?

3 A No.

4 Q Do you know what type of damage the Mahonys had?

5 A I believe it was mold related.

6 Q When you say, mold related, was that information that
7 you got from an amended complaint?

8 A That's correct.

9 Q You didn't review any depositions, did you?

10 A No.

11 Q You didn't see any photograph depicting damage, did
12 you?

13 A No.

14 Q You didn't see any repair items or repair cost
15 information, did you?

16 A That's right. I didn't see it.

17 Q You don't know whether there was damage to the deck, do
18 you?

19 A I don't know.

20 Q You don't know whether there was damage to the garage,
21 do you?

22 A I don't know.

23 Q You don't know whether there was damage to a
24 flex/office or a second-floor baby's room, do you?

25 A I do not know.

1 Q You don't know whether there was damage to the roof, do
2 you?

3 A I do not know.

4 Q You don't know if there was evidence of any of the
5 people repairing anything in the home, do you?

6 A I don't know.

7 MR. KELSKY: I have no other questions, Your
8 Honor.

9 THE COURT: Redirect.

10 MR. SOTO: Yes, Your Honor.

11 REDIRECT EXAMINATION

12 BY MR. SOTO:

13 Q Mr. Hoyos, you are here determining your value,
14 assuming that there was \$82,000 worth of damages at this point,
15 correct?

16 A Correct.

17 Q And is the value of a property with the market fair as
18 to what people are willing to pay for it?

19 A Between a buyer and seller and an honest transaction.

20 Q And so if the Mahonys were willing to pay part of that
21 damage because of the uniqueness of the house, that would
22 ultimately be the value of this house; is that correct?

23 A That is my whole point.

24 MR. SOTO: No further questions, Your Honor.

25 THE COURT: Members of the jury, if anyone has a

1 question of this witness you may raise your hand. All
2 right, there are no questions. Is this witness free to step
3 down?

4 MR. SOTO: Yes, Your Honor.

5 THE COURT: Is he released from all subpoena's?

6 MR. SOTO: Yes, Your Honor.

7 THE COURT: You're free to step down.

8 Mr. Soto, what's the defendants' next order of
9 business?

10 MR. SOTO: Your Honor, the defense rests.

11 THE COURT: Rebuttal?

12 MR. KELSKY: No, Your Honor.

13 THE COURT: All right. Members of the jury, at
14 this time both the parties have rested and concluded their
15 case. There are some issues I need to address outside of
16 your presence with the attorneys. I'm going to ask that you
17 step back into the jury room, and we'll do this as quickly
18 as we can, but it may take us a little bit.

19 Leave your notepads upside down on your chair.

20 (The jury was escorted from the courtroom.)

21 THE COURT: Be seated.

22 Mr. Kelsky, you said you had the jury
23 instructions.

24 MR. KELSKY: Yes. May I approach?

25 THE COURT: You may.

1 All right. First of all, any motions from the
2 plaintiff?

3 MR. KELSKY: Since there are no affirmative
4 defense, then, no, I have no motions.

5 THE COURT: Mr. Soto, any motions?

6 MR. SOTO: Your Honor, we just renew our directed
7 verdict motion.

8 THE COURT: Any new or different arguments?

9 MR. SOTO: No, Your Honor.

10 THE COURT: Any new or affirmative responses?

11 MR. KELSKY: No, Your Honor.

12 THE COURT: The defendants' renewed motions for a
13 directed verdict would be denied.

14 And you handed me the revised jury instructions.

15 MR. KELSKY: I have one comment, just so you know,
16 I couldn't find 409.12 instruction, so I redid it as best as
17 I could from my memory. I'm sorry. 401.2.

18 MR. SOTO: Your Honor, I don't have a copy of it.

19 MR. KELSKY: I just gave you the jury
20 instructions.

21 THE COURT: Okay. Just take a minute and just get
22 yourself situated.

23 All right. Do you have your set, Mr. Soto?

24 MR. SOTO: Yes.
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THE COURT: Let's just go through them sequentially.

Does each side have a set of the jury instructions?

MR. KELSKY: Yes.

THE COURT: Mr. Soto?

MR. SOTO: Your Honor, I have 401.1 through 409.10 -- actually I have the rest, Your Honor.

THE COURT: All right. The first packet handed to me is 401.1, any objection from either party?

MR. SOTO: No, Your Honor.

THE COURT: 401.2, any objection from either party?

MR. SOTO: No objection.

MR. KELSKY: No objection, Your Honor.

THE COURT: 401.3, the greater weight of the evidence, agreeable to both sides?

MR. SOTO: No objection.

MR. KELSKY: No objection, Your Honor.

THE COURT: 409.7, issues on plaintiffs' claim, fraudulent misrepresentation.

MR. SOTO: No objection.

MR. KELSKY: No objection, Your Honor.

THE COURT: 409.10, burden of proof on main claim.

MR. SOTO: No objection.

1 MR. KELSKY: No objection, Your Honor.

2 THE COURT: 409.13, damages modified.

3 MR. SOTO: Just so Your Honor knows I took out
4 409.11 and 409.12 because those are the affirmative
5 defenses, that's why it goes next to 409.13.

6 THE COURT: Mr. Soto, at the conclusion of this
7 I'm going to ask both parties if there's any additional
8 instructions that either of you are requesting.

9 So just going through the packet, the next one I
10 have is 409.13, damages modified.

11 MR. SOTO: No objection.

12 MR. KELSKY: No objection, Your Honor.

13 THE COURT: 601.1, weighing the evidence.

14 MR. SOTO: No. Objection, Your Honor.

15 MR. KELSKY: No objection, Your Honor.

16 THE COURT: 601.2 (a) and (b).

17 MR. SOTO: No objection.

18 MR. KELSKY: No objection, Your Honor.

19 THE COURT: 601.5.

20 MR. SOTO: No objection.

21 MR. KELSKY: No objection, Your Honor.

22 THE COURT: And 700.

23 MR. SOTO: No objection.

24 MR. KELSKY: No objection, Your Honor.

25 THE COURT: Mr. Kelsky, any additional

1 instructions that the plaintiff is requesting?

2 MR. KELSKY: No, Your Honor.

3 THE COURT: Mr. Soto, any additional instructions
4 that the defense is requesting?

5 MR. SOTO: No, Your Honor.

6 THE COURT: Now the verdict form, do you have
7 copies of that?

8 MR. KELSKY: I do.

9 THE COURT: Mr. Kelsky is handing me a proposed
10 verdict form, do you have a copy, Mr. Soto?

11 MR. SOTO: Yes, Your Honor.

12 THE COURT: Have you had an opportunity to review
13 them?

14 MR. SOTO: I have, Your Honor.

15 THE COURT: Mr. Kelsky, any modification or
16 changes?

17 MR. KELSKY: No, Your Honor.

18 THE COURT: Mr. Soto, what's your position?

19 MR. SOTO: No objection, Your Honor.

20 THE COURT: All right. Any additional issues or
21 matters that the plaintiff would like to address?

22 MR. KELSKY: No, Your Honor.

23 THE COURT: Any additional matters or issues that
24 the defense would like to address?

25 MR. SOTO: No, Your Honor.

1 THE COURT: All right. Then I'm going to suggest
2 that the parties take a short break.

3 (A recess was taken.)

4 (The proceedings resumed as follows:)

5 THE COURT: Members of the jury, you have now heard
6 and received all of the evidence in this case. I am now
7 going to tell you about the rules of law that you must use
8 in reaching your verdict.

9 You will recall at the beginning of the case, I
10 told you that if at the end of the case I decided that if
11 different laws apply, I would tell you. These instructions
12 that I'm about to give you are slightly different from what
13 I gave you at the beginning, and it is these rules of law
14 you must follow.

15 When I finish telling you about the rules of law,
16 the attorneys will present their final argument, and you
17 will then retire to decide your verdict.

18 Deputy, will you hand each of the jurors a set of
19 instructions?

20 If you'd like to follow along, I'm starting now on
21 the second page.

22 The claim in this case is as follows: The
23 plaintiffs' claim that the defendant fraudulently
24 misrepresented the condition of the home they sold to
25 plaintiffs resulting in damages sustained by plaintiffs.

1 The plaintiffs must prove their claim by the greater weight
2 of the evidence. I will now define some of the terms you
3 will use in deciding the case.

4 Greater weight of the evidence means a more
5 persuasive and convincing force and effects of the entire
6 evidence in the case.

7 The issue for you to decide on issues claimed for
8 fraud and misrepresentations are: First, whether the
9 defendant made a false statement concerning material facts.
10 Second, whether defendants knew the statements were false.
11 Third, whether the defendants intended that another would
12 rely on the false statements. Four, whether plaintiffs
13 relied on the false statement, and if so, fifth, whether the
14 false statements was a legal cause of damage to plaintiffs.
15 Plaintiffs may rely on false statements, even though its
16 falsity could have been discovered if plaintiffs had made an
17 investigation. However, plaintiffs may not rely on false
18 statements if they knew it was false, or its falsity was
19 obvious to them.

20 If the greater weight of the evidence does not
21 support the plaintiffs claim, your verdict should be for the
22 defendants on this claim.

23 If you find for the defendants, you will not
24 consider the matter of damages, but if you find for the
25 plaintiffs, you should award plaintiffs an amount of money

1 that the greater weight of the evidence shows will fairly
2 and adequately compensate plaintiffs for the following:
3 One, the difference between the actual value of the property
4 and its value had the alleged facts regarding is true or the
5 difference between the purchase price -- let me restate it I
6 misread it. The difference between the actual value of the
7 property and its value had the alleged facts regarding it is
8 true, or the difference between the purchase price and the
9 actual value of the property at the time the fraud was
10 discovered.

11 In deciding this case, it is your duty as jurors to
12 decide the issues and only those issues that I submit for
13 your determination.

14 You must come to an agreement about your verdict.
15 Your agreed upon answers to my questions are called your
16 jury verdict.

17 The evidence in this case consists of the sworn
18 testimony of the witnesses, all exhibits received in
19 evidence and all facts that were admitted or agreed to by
20 the parties.

21 In reaching your verdict, you must think about and
22 weigh the testimony and any documents, photographs, or other
23 material that has been received in evidence.

24 You now can consider any facts that were admitted
25 or agreed to by the lawyers. Your job is to determine what

1 the facts are. You may use reason and common sense to reach
2 conclusions. You may draw reasonable inferences from the
3 evidence, but you should not guess about things that were
4 not covered here, and you must always apply the law as I've
5 explained them to you.

6 Let me speak briefly about witnesses. In
7 evaluating the believability of any witness and the weight
8 you will give the testimony of any witness, you may properly
9 consider the demeanor of the witness while testifying, the
10 frankness or lack of frankness of the witness, the
11 intelligence of the witness, any interest the witness may
12 have in the outcome of the case, the names and opportunity
13 the witness had to know the facts about which the witness
14 testified, the ability of the witness to remember about
15 which the witness testified and the reasonableness of the
16 testimony of the witnesses, consider in the light of all of
17 the evidence in the case, and in the light of your own
18 experience and common sense.

19 You've heard opinion testimony and certain
20 technical subjects from persons referred to as expert
21 witnesses. You may accept such opinion testimony, reject
22 it, or give it the weight you think it deserves, considering
23 the knowledge, skills, experience, training, or education of
24 the witness, the reasons given by the witness or the opinion
25 expressed and all of the other evidence in this case.

1 That is the law that you must follow in deciding
2 this case. The attorneys for the parties will now present
3 their final arguments, and when they're through, I will have
4 a final instruction regarding your deliberations.

5 Any objections to the instructions that were read
6 to the jury. Plaintiff?

7 MR. KELSKY: No, Your honor.

8 THE COURT: Defendant?

9 MR. SOTO: No, Your Honor.

10 THE COURT: Any additional instructions requested
11 from the plaintiff?

12 MR. KELSKY: No, Your Honor.

13 THE COURT: From the defendant?

14 MR. SOTO: No, Your Honor.

15 THE COURT: All right. Then proceed with closing
16 arguments.

17 Mr. Kelsky, do you need a time limit?

18 MR. KELSKY: I don't believe so, but I would like
19 to reserve ten minutes for rebuttal.

20 THE COURT: Ten minutes out of the 45?

21 MR. KELSKY: Yeah. But I don't think I'll be that
22 long.

23 THE COURT: All right.

24 MR. KELSKY: May it please the court?

25 THE COURT: Yes.

1 MR. KELSKY: Counsel. Ladies and gentlemen of the
2 jury, in jury selection and in opening statements I told you
3 that this was a simple case. I told you it was simple as
4 CRC, concealed rotted construction, and I told you it was as
5 simple as CRC, certified residential contractor. And that
6 is the very construction license that Mr. Rodriguez holds as
7 issued to him from the State of Florida.

8 The court has instructed you in this case on
9 judging the greater weight of the evidence. The greater
10 weight of the evidence means the more persuasive, convincing
11 force and the effect of the entire evidence in the case.

12 Remember in jury selection, I gave you an example
13 of two equals of 50 pennies, and that if the plaintiff would
14 just need one more penny to make 51 pennies to be able to
15 carry their burden of proof. And it's based upon all of the
16 evidence and testimony that the plaintiff did by the greater
17 weight of the evidence prove their claims against the
18 defendants, Mr. and Mrs. Rodriguez.

19 One of the other instructions that the judge just
20 read to you was, you may use reason and common sense to
21 reach conclusions. We're going to talk about that in a few
22 seconds.

23 Before we get into the substantive issues in the
24 case, this is the quote out of the contract submitted into
25 evidence. Not the real property disclosure statement which

1 was a separate document, the actual terms of the contract.
2 The seller knows of no facts materially affecting the value
3 of the real property, which are not readily observable and
4 which have not been disclosed to buyer. So right off the
5 bat, you heard about eight months before this transaction
6 ever closed the Rodriguez's signed and dated in a contract
7 stating that they knew of nothing material that would affect
8 the value of the property, and in fact, they repeated that
9 sentiment when they filled out seller's of real property
10 disclosure form which warned them and said, in Florida a
11 seller is obligated by law to disclose to a buyer all known
12 facts materially affecting the value of the property sold
13 when they're not readily observable. Two different warnings
14 about what their obligations were in a residential contract.

15 Now what were the false statements of material fact
16 that were made to the Mahonys. There are five elements that
17 we have to prove: The first element is the defendants' made
18 a false statement concerning material facts. Well I think
19 you've heard enough testimony to show that the Rodriguez's
20 concealed numerous items to the Mahonys. The first one was
21 the balconies simply had standing water that just needed to
22 be broomed. I'll talk about the substantive testimony from
23 the expert instruction a little bit later. But that was a
24 false statement of material fact and the evidence backed
25 that position. The garage simply needed some paint, it was

1 a cosmetic repair. The baby's room, a leak had been
2 repaired. As the testimony showed, maybe the leak had been
3 repaired, but the insulation wasn't repaired, the studs
4 weren't repaired, the metal strapping wasn't repaired.
5 You've seen pictures of all of this showing rotted building
6 materials, black, gross, etcetera, I mean you have all of
7 the photos in evidence which you can take back with you to
8 look at. They told them the French doors had minimal damage
9 to the bottom of them, and they told them that the exterior
10 of the home needed to be repainted. We know these
11 statements are false. We know this is all based upon what
12 the contractor said and what the evidence shows.

13 The second element we have to prove is the
14 defendants knew these statements were false. How do we know
15 that? Jamie Rodriguez is a certified residential
16 contractor. He had professional knowledge about the Florida
17 building codes. Prior to, during the construction, after
18 the construction, and up and through the time that he moved
19 out of that house. And as you heard from both Mr. Rodriguez
20 and Kevin Karten, they just don't hand out certified
21 residential contractor licenses. You have to go to classes.
22 You have to take the test. You have to submit an
23 application. And that class is two days. Two portions of
24 the test, one is financial responsibility, and the other one
25 is about the Florida building codes.

1 So Mr. Rodriguez, for a period of years, before
2 this property was ever sold to the Mahonys, had intimate
3 knowledge of the Florida Building code, and once more when
4 he builds his own homes, those homes have to comply with the
5 Florida building codes. He told you specifically that he
6 understood that balconies needed to slope away from the
7 house. He even gave you measurements. I believe he said it
8 was 1/8 inch per foot away from the structure. So by
9 definition of a properly sloped balcony, would never have
10 standing water on it per the Florida building code. There's
11 no dispute about this. If there's standing water, if
12 there's water that needs to be broomed off the balcony, it's
13 not flooding over the edge of the balcony, it does not meet
14 the building code. And while Mr. Rodriguez used the term,
15 in a perfect world that happens, members of the jury, he did
16 to you what he did to the Mahonys. He's trying to conceal
17 from you the very fact that the balconies themselves were a
18 violation of the Florida building codes. The reality is
19 that we don't live in a perfect world. We rely on people's
20 representations. Words matter. Representations matters.
21 And to tell you what condition should be like in a perfect
22 world is no different than telling you it's a cosmetic
23 issue, it's trying to conceal the full extent of the damages
24 suffered by these balconies. His words matter. Concealing
25 issues matters.

1 You also heard the testimony of Rick Edrem who told
2 you that there were signs and symptoms damage to the home
3 that would be readily apparent to a construction
4 professional. This is part of expressed sentiment as well.
5 In fact, when Mr. Edrem got down from the witness stand, he
6 showed you on the Elite Mold Services, Inc. report the
7 evidence of a water stain coming from the balcony.

8 Now, you'll have the actual report with you back in
9 evidence, and you can see where it is, and if you look at
10 where he circled, there is one streaking coming down from
11 these balconies.

12 He told you that is evidence to a construction
13 professional like Mr. Rodriguez that there is something
14 wrong going on with this balcony. And remember, he told the
15 Mahonys to paint the exterior of the home. Well what would
16 painting the exterior of the home do? It would be to
17 conceal all those stainings coming down from the balconies,
18 so that's giving them the representation that they just
19 needed to paint the exterior doing nothing more than trying
20 to cover up the very condition he was trying to conceal from
21 them.

22 Use your reason and common sense. What would paint
23 do? Paint would simply cover up the problem.

24 Mr. Karten told you that it was so extensive that
25 it would have been impossible for a certified residential

1 contractor like Mr. Rodriguez to not know that there was
2 significant damage to this home. He told you that there
3 was, his words, no doubt, 100 percent that a construction
4 professional like Mr. Rodriguez knew that the problems in
5 his home were going on for a period of years, not days, not
6 weeks, not months, and don't be fooled by Larry Smith's
7 information that's going to come up in the defenses' case.

8 Mr. Edrem sat there and told you that when he got
9 there, Larry Smith had a hole in the balcony, primarily
10 because he put his foot through it, the hole of the balcony,
11 and there was a small area in the top of the bedroom that
12 they removed some drywall. Well, in reality, that's sparked
13 the need to find out why there was so many problems in the
14 home. He actually saw the damage and that led to the
15 investigation. But what Mr. Edrem also told you was that
16 there was nothing that Larry Smith did that caused or
17 contributed to cause any type of problem to the home. Don't
18 be fooled by the argument. All he's trying to do is blame
19 something else on the damages that were concealed by the
20 Rodriguez's.

21 Larry Smith is what we call a red herring, it's
22 something that doesn't exist.

23 Let's talk about the garage for a little bit
24 because Mr. Rodriguez testified that the garage required a
25 quick repair. He told you that, however, what Mr. Karten

1 and Mr. Edrem told you that putting up drywall in the
2 ceiling would do nothing more than conceal the damage.

3 Look at the photograph. That's the edge of the
4 drywall that was cut away. Look at the damage. What
5 happens when you put drywall over this? You conceal what's
6 going on underneath it. The interesting thing about the
7 quick repair that was made, if you remember that
8 Mr. Rodriguez's testimony, that was that the leak in the
9 garage and the leak in the roof occurred at the same time.
10 So what was the quick repair? The quick repair was throwing
11 up drywall. What was the quick repair in the baby's room?
12 Throwing up drywall. This is what it looked like at the
13 same time the quick repair was made, and isn't it exactly
14 what the reason and common sense would tell you, look right
15 behind the wall, the drywall was put up in the baby's room.

16 And you know, one of the other arguments that was
17 made was that the problem was fixed and they lived at the
18 home for a period of years. That was what they said. It
19 happened in 2009 after they stopped paying the mortgage,
20 there was a problem in the baby's room, and they repaired
21 it. Well, members of the jury, if that's the case and they
22 did the repair that they said that they did, then why would
23 there be staining on the wall back in 2011 when it was going
24 to be sold? Why would that be the case? The answer is
25 there was either a leak that was not repaired or there was a

1 new leak at the time it was disclosed. And remember what
2 Rick Edrem told you, Rick Edrem told you that he looked up
3 into the ceiling, out through the sky, out through the hole
4 he could see the sky. So my suggestion to you, members of
5 the jury, is that putting up drywall is simply a cosmetic
6 repair.

7 And let's talk for a second about the people at the
8 company that allegedly made the repairs to the roof. The
9 defense offered you not a single witness to corroborate that
10 a repair was made, they didn't show you any document or
11 evidence to establish the repair was made. They gave you no
12 documents that you could look at to show that a repair was
13 made. They didn't offer anything substantive to tell you
14 that repair had in fact been made.

15 We also talked about the French doors, and the
16 French doors, there we had some soft wood underneath. Well,
17 again, they told them it was cosmetic. But, again, you
18 heard from Rick Edrem and he said, no, there's evidence of
19 water intruding into the home causing it to be rotted
20 requiring the whole thing to be replaced.

21 Again, things that were known by Mr. Rodriguez by
22 virtue of him being a construction professional licensed in
23 the State of Florida.

24 So in summary of this issue, the testimony and
25 evidence from Mr. Rodriguez and Mr. Karten clearly

1 established that the representations made are by cosmetic
2 defects existing in the garage on the balconies in the
3 baby's room, were all nothing more than an attempt to
4 conceal the nature of the damage. And how do we know that?
5 That's just simply looking at the issue of the fact that
6 they intended the Mahonys to rely upon the false statements.

7 Remember, they stopped paying their mortgage in
8 2009, and by 2011, they had received multiple offers on the
9 home, but the only home offer that was accepted was the one
10 by the Mahonys because it was a cash payment. Because they
11 needed the cooperation of the bank in order to approve the
12 sale.

13 They needed to sell the house in order to avoid a
14 foreclosure judgment. Mr. Soto did a good job at keeping
15 them out of the foreclosure judgment for three years. The
16 bank was not going to let this thing go on forever, and
17 eventually that house would have been foreclosed upon. They
18 would have had a judgement issued against them.

19 One way or another a foreclosure judgment was
20 coming down the line, and remember, members of the jury,
21 they also received a \$50,000 cash benefit at the time of
22 closing. So in reality, they were going to strip the home,
23 as they told the Mahonys in exchange for giving us \$50,000
24 cash. Mr. Soto in opening told you that they didn't get
25 anything from the transaction with the Mahonys. That's not

1 true. The bank got repaid and they got \$50,000 cash. And
2 let's be honest about this, Mr. Rodriguez, a certified
3 residential contractor knew about the defects affecting this
4 home.

5 If he had stayed in his home, he would have been
6 forced to pay \$83,000 to bring it up to standards to make it
7 livable.

8 So not only did -- the intent here was to sell the
9 home to get the bank off their back, but also to avoid
10 having a money pit that would be required to repair the
11 home. There was intent here, they needed out of the house,
12 they needed to get out of the house, they needed to avoid
13 having to pay for the repairs that the home had.

14 Now let's talk about the fourth element. The
15 Mahonys relied upon false statements. Who better to rely on
16 then Jamie Rodriguez, a certified residential contractor
17 about the condition of the home. They knew it inside and
18 out, that was built for him and Mrs. Rodriguez and they
19 lived there for a period of years.

20 You heard from Rick Edrem, who not only was a
21 general contractor, a licensed Florida mold assessor, a
22 licensed Florida mold remediator, but also a home inspector,
23 and what he told you was that contractors are better at home
24 inspections than home inspectors who don't have any
25 construction background.

1 The defense was literally telling you that the
2 Mahonys should have assumed that the Rodriguez's were lying
3 to them at the time they made the misrepresentation about
4 the condition of the home. They want to extend that
5 argument to say, they should have gotten a home inspection.
6 Really, they should have gotten a home inspection from
7 somebody who had less training credentials than a certified
8 residential contractor. Use your reason and common sense.
9 That is an absurd position. We relied upon statements. We
10 should not assume that a seller that made these
11 representations was lying to the buyer. That's what their
12 argument is. It's another way of concealing their
13 responsibility. They would like to say, it's not my
14 problem, it's their problem because they didn't get an
15 inspector from somebody who was less qualified as a
16 certified residential contractor who owns the house. That
17 is an absurd argument.

18 And in fact the jury instruction -- this is the
19 jury instructions, plaintiff may rely on a false statement
20 even though its falsity could have been discovered if
21 plaintiffs had made an investigation. There is no legal
22 requirement that they get an inspection. It is a smoke
23 screen. They're trying to block their liability and their
24 responsibility for making false statements. And this
25 instruction is the law that you are required to follow in

1 rendering your verdicts. Plaintiffs may rely on a false
2 statement. There were numerous false statements that were
3 made over and over, and there were numerous statements that
4 were relied upon by the Mahonys.

5 But if you delve into this issue, the circumstance
6 is a little bit more. Ask yourself the question, well why
7 didn't they get an inspection? Because Mr. Rodriguez, a
8 certified residential contractor told them that there was
9 nothing wrong with the house. Even Rick Edrem who is a GC,
10 a general contractor and a home inspector testified that if
11 you ask the seller if there's been a repair, the buyer
12 generally accepts that. So again, the concept is, you get
13 to rely on false statements. However, you don't get to
14 avoid responsibility for making those false statements, and
15 that is precisely what you're being asked to do by the
16 defense in this case.

17 And notice, at no point and time, did the court
18 instruct you that it is an element of law that the Mahonys
19 need to get an inspection for this home. This jury
20 instruction negates that, and there was no instruction
21 telling you that they have to do so.

22 So as you can see, ladies and gentlemen of the
23 jury, the Mahonys relied upon a false statement, and you
24 even heard both of the Mahonys telling you that they
25 accepted Mr. Rodriguez on his word, that there was nothing

1 wrong with the home. He repeatedly, Mr. Mahony testified
2 that Mr. Rodriguez repeatedly told him, and did a good job
3 at convincing him, they knew the home inside and out, and he
4 was a certified residential contractor, and if the house had
5 any issue, he would know about them, and Mrs. Mahony told
6 you that she was really sure by the same set of
7 circumstances and the same facts.

8 Please avoid the argument by using your reason and
9 common sense that they should have gotten a home inspection
10 by somebody who's less qualified than Mr. Rodriguez. There
11 was no reason for the Mahonys not to rely upon or believe
12 the statements that were being made to them.

13 The next issue in your consideration is the issue
14 of damages. And I want to talk about this for a second
15 because -- let's start with the first floor. Mr. Mahony sat
16 up there on the jury stand the first day of trial and marked
17 out the areas of the house. Every single one of the shaded
18 areas had damage to them. What the defense would like you
19 to believe is to compartmentalize each individual areas,
20 they keep talking about the laundry room, they keep talking
21 about a bathroom. What they have refused to acknowledge is
22 that the damage from the exterior of the home intruded into
23 the interior of the home. Mr. Karten told you that from a
24 construction standpoint that that's exactly what happens
25 when water wicks away. Mr. Edrem told you the same thing.

1 So remember the floor plan when you go back into
2 the jury room you have a copy of the floor plan that's in
3 evidence, keep in mind all of this was damaged, all of this,
4 and how is it possible from a standpoint from a certified
5 residential contractor did not notice this damage. It's
6 impossible.

7 Let's take a look at the ground floor. All of this
8 damage in the garage area is right below Baby Owen's room,
9 right coming from Baby Owen's deck. Keep in mind that
10 Mr. Rodriguez told Mr. Mahony that it was a small deck leak,
11 but denied that on the stand. But look at this, it's all
12 consistent with the deck, the substructure that I showed you
13 a little while ago in the photograph of the garage ceiling.
14 That's what this is, this is the damage, the water damage,
15 the extent of damage coming from the leak in the balcony.
16 Look how far it went into it, if the balcony is over here,
17 and the garage is over here look at how extensive that
18 damage is. Look at the damage from underneath that deck,
19 it's what we call the catwalk. That's the one that Larry
20 Smith's foot fell through. Does that look like damage that
21 occurred in a day or a week or a month, it was so bad that
22 his foot fell through there. What would have happened if
23 one of the children were on that deck? Look at how bad it
24 is.

25 Now, at no point during this trial, did you hear

1 any evidence of testimony presented by the defense about the
2 nature and extent of the construction damage. They never
3 put on a single piece of evidence to say, it didn't occur.
4 The water didn't intrude into the home. The water didn't
5 intrude into other places. The only testimony and evidence
6 was from our case, the plaintiffs' case that this was the
7 case. But you recall that it was Mr. Rodriguez's that said,
8 yeah, that damage is extensive, that, he, as a residential
9 contractor didn't refute, did not say that the damages that
10 we are contending did not occur. The only evidence that you
11 have to rely on as it relates to damages, is the evidence
12 that's presented by the plaintiffs.

13 You're going to get to take back with you to the
14 jury room approximately 70 different photos that we have
15 submitted into evidence in this case, 70 of them, or roughly
16 70 of them, damage, mold, constructions materials rotted,
17 degraded in need of replacement, dangerous, the photographs,
18 unlike people, don't lie. And every photograph is worth a
19 thousand words. Members of the jury, there's about 70,000
20 words here that describe the extent of damage suffered by
21 the Mahonys in this home.

22 And let's just for clarity, let's just take a quick
23 look at some of the home damage again. We just talked about
24 this picture, Mr. Smith's foot went through that hole. That
25 is a deck, there's a balcony, damage is not just a small

1 area, the damage is throughout. It is black. There's
2 actually wood falling off of it, chipping off of it. It's
3 degraded from top to bottom. Baby Owen's room, black,
4 rusty, degrading, falling apart. Now let me just touch for
5 a second on this topic. Because you heard the examination
6 -- the testimony offered by the defense that Mrs. Rodriguez
7 had a high-risk pregnancy. Well, a new born baby was living
8 in a room that had this and had mold all over the place. So
9 if we want to talk about people who are exposed, that was
10 what Baby Owen was being subjected to. And let's all keep
11 in mind that it took the Mahonys months, months, to get this
12 thing repaired. So that new born baby was living in this
13 horrific environment, and they had to sit there and endure
14 months of repairs, construction work, debris, amongst all of
15 those other things. So be forewarned that we don't want
16 your sympathy and the jury instructions in reaching your
17 verdict don't let bias, sympathy, prejudice, public opinion,
18 etcetera, cause you to be influenced in your decision.

19 Again, they're offering you a smoke screen. A
20 high-risk pregnancy is nothing more than a way of saying,
21 feel bad for us, we don't want to be held responsible for
22 the actions we concealed, but you are not allowed by the
23 jury instructions to consider that when you make your
24 verdict.

25 Let's talk about the verdict form for a second.

1 You're going to be asked two questions. Did the defendant
2 misrepresent the condition of the home? I submit to you
3 based upon all five elements of which there's overwhelming
4 evidence, there's nothing that the defendant's going to
5 refute, the answer is yes.

6 What is the amount of damages sustained by
7 plaintiffs as a result of misrepresentation made about the
8 home? Well, we know a couple of things. What we know is
9 that this is what it's going to cost to repair. It cost the
10 Mahonys \$82,000, \$82,886.60, you heard the testimony from
11 Barbara Driscoll, there's two ways of doing this. We know
12 that the home was purchased for \$560,000. I can't even get
13 this on a straight line. Okay. But if we subtract
14 \$82,888.60 what do we get? We get \$477,111.40. That's what
15 the value of the home would have been had the information
16 been disclosed. So from an out-of-pocket standpoint, is
17 that the two measure of damages that you have their damages
18 are either \$82,888.60 or as Ms. Driscoll explains, \$400,000
19 because nobody in their right mind would pay for a home at
20 full value when there's \$83,000 that has to be repaid. You
21 get an incentive. You're always going to pay less for
22 something that has damages and has to be repaired. So the
23 measure of damages that Ms. Driscoll testified to is either
24 going to be \$82,888.60 or \$100,000, so something happened
25 that was rather surprising, and that is you heard the

1 defense testimony of Mr. Hoyos. Mr. Hoyos testified the
2 fact there was those \$83,000 in damage, the purchase price
3 of the real value is \$460 was actually \$450,000. He
4 actually said the value of the property was less than Ms.
5 Dricsoll did, and there was \$82,888.60 in damages. So what
6 the defense is saying is that they suffered more damages
7 than the plaintiff is saying they suffered.

8 So when you go back to the jury form, the verdict
9 form, you have an opportunity to either award \$82,888.60 or
10 \$100,000 and if you listen to what the defense said,
11 \$110,000. The Mahonys just want to be compensated for what
12 their damages are and what their losses are. They don't
13 want a single penny more than they're entitled to recover.

14 If you award them this amount of money, they would
15 have no problem. They don't want anything else beyond that
16 in which they are legally entitled to recover.

17 Ladies and gentlemen of the jury, please look at
18 all of the evidence, consider all of the testimony, consider
19 the summary of damages confirming the \$82,888, look at all
20 69 photos, look at the report from Certified Mold Solution,
21 look at the report. I know your time is valuable. I know
22 you've spent a lot of time here listening to a lot of
23 evidence, and a lot of testimony. Your contributions to our
24 governmental system and the way things work, I greatly
25 appreciate it. When you go back to deliberate we ask

1 verdict as set forth in our presentation. Thank you so much
2 for your time.

3 THE COURT: Mr. Soto.

4 MR. SOTO: Thank you, Your Honor.

5 Ladies and gentlemen of the jury, thank you for
6 service. I really appreciate you being here and so do the
7 Mahonys and so do the Rodriguez's and everybody else.

8 To know or not to know, that's really the
9 fundamental question you have to decide in this case,
10 whether or not Mr. Rodriguez told the Mahonys, if he told
11 the Mahonys end of story, end of decision. You can sign in
12 favor of the defense.

13 The other issue about the jury instruction that you
14 have to decide is that there's no word, should, there's
15 nothing in that instruction that said Mr. Rodriguez should
16 have known there were other issues in the home. And that is
17 by definition very important because I will assert based
18 upon his testimony of the entire case of the plaintiffs,
19 that's their case, that Mr. Rodriguez should have known
20 about all of these issues. But that's not what we're here
21 to decide today. And that he doesn't get the fact that
22 Mr. Rodriguez told them all they knew, that's all that is
23 required under the law, no more no less.

24 Let's talk about the house. You saw a bunch of
25 really nasty pictures. Mr. Hoyos even said that is the only

1 house in Avalon park like that. As you can see it has
2 courtyards, balconies, and towers, and things that aren't in
3 every day houses.

4 Let's talk about the defects one by one as alleged
5 by the plaintiffs. First you have the office, otherwise
6 known as the baby's room. That was disclosed in writing.
7 Undisputed. I know Kelsky had talked about the contract and
8 and how that wasn't disclosed, well, it's also an as is
9 contract. What the law is if it was disclosed whether it
10 was in writing, or orally, that's just as good. It just
11 doesn't have to be in writing. So you have the office,
12 there was a leak and that it was fixed. You heard
13 Mr. Rodriguez's testimony about. You heard that there was a
14 roof repair. They waited a couple of months to make sure it
15 was dry and they had Otero Home Improvement fix that office,
16 and he disclosed it. He said there was a leak and it was
17 fixed, and that's what he knew.

18 Next, the balconies, we heard a lot of testimony
19 from Mr. Mahony yesterday that kind of revealed more and
20 more as it went on, far more than what you heard on the
21 first day about that water. And we talked about the
22 balconies. There was a discussion that there was standing
23 water. There was a discussion that Mr. Rodriguez would
24 sweep the water off, and that he knew there was standing
25 water. And that was disclosed orally, but it was disclosed.

1 The French doors, they talked about those, and Mr.
2 Rodriguez said that there was some damage on the bottom, and
3 that he believed it was water damage. Mr. Mahony also
4 acknowledged that there was damage disclosed about the
5 bottom of the French doors, so those as well as the garage,
6 and that was where they ultimately had to fix the drywall on
7 top. That was also part of the walkthrough. And you heard
8 Mr. Rodriguez mention that they had fixed it, and we also
9 heard from Mr. Hoyos, he looked up and saw it and knew that
10 was part of the original leak, and Mr. Rodriguez said that
11 there was a leak, and that he believed it was fixed.

12 Let's talk about the master bedroom and bathroom.
13 We, the whole time, Mr. Rodriguez and Mrs. Rodriguez, they
14 didn't know there was a problem. The laundry room as well,
15 this is something they didn't know, and so they didn't
16 disclose. That is our assertion. That is our belief.
17 That's Mr. Rodriguez and Mrs. Rodriguez said the whole time.

18 I assert that the evidence has shown that Mr.
19 Rodriguez told the Mahonys what he knew, and that is all
20 that was required under the law.

21 So the motivation, the Rodriguez's, it's
22 undisputed, they weren't going to get a dime from the short
23 sale, whether it was \$460 or whether it was \$660, they were
24 still not going to get anything because the mortgage was
25 \$900,000.

1 Now in the contract that they originally agreed on,
2 there were some items that both parties came to an agreement
3 that those items worth \$50,000. So the Rodriguez's would
4 have walked out with the items that they paid for. So they
5 would have either walked out with those items that were
6 worth \$50,000 or they would have taken Mr. and Mrs. Mahony's
7 offer of \$50,000. They also told them that that wasn't the
8 reason why they were selling the house. That was something
9 that happened after the fact. And so despite all the
10 discussion about how that was the main motivation to run
11 away with \$50,000 and leave. They would have gotten the
12 items that were already in the contract, or because the
13 Mahonys decided at some point they wanted to pay \$50,000 to
14 keep those items.

15 Let's talk about state of mind. You have first
16 heard the facts that this was the Rodriguez's dream house.
17 They saved up for ten years. They put \$400,000 down. They
18 wanted to keep it. If it wasn't for the recession, we may
19 not even have been there. They wanted to stay there their
20 whole lives. And they never believed it was this money pit
21 that was described by Mr. Mahony. They loved the house. It
22 went into foreclosure, and they tried to modify it. Why
23 would they modify a house they thought was a wreck? And on
24 both sides we have children involved. And it is unfortunate
25 on both sides. Why would they allow their children to stay

1 there if they thought it was going to be overrun with mold
2 damage, that they thought was overrun with water intrusion
3 up until the day of the sale. Is that something that people
4 would do if they believed that the house had tremendous
5 defects? No. They wouldn't risk their kids' health. And
6 they go even further, when you look at the fact that Mrs.
7 Rodriguez was in a high-risk pregnancy the whole time, and
8 she was bedridden and staying in the master bedroom and
9 using the master bathroom. If a person thinks that there's
10 mold in the walls, that there's water in the wall stay in a
11 high-risk pregnancy, and put that baby at risk. The baby
12 that was far more important to her than that house and they
13 stayed until the very end. Why? Because they didn't
14 believe it was the money pit as was described.

15 And then after that, after the sale when Mr. and
16 Mrs. Mahony called, Mr. Rodriguez came back. Would a person
17 who concealed that come back to help? Is that the great
18 getaway, and even more, they moved next door. Who does
19 that? Who's next door to the people that just concealed
20 facts from them. You would go away. You wouldn't want to
21 be right next door where you can hear over and over telling
22 them, oh, you concealed this, you concealed that. Those are
23 the actions of the people that felt they told them
24 everything they knew. They told them what they knew and
25 that was it.

1 Now, there was also the handyman, Mr. Larry Smith.
2 And what happened. He had the testimony of Mr. Rodriguez
3 was supported by the testimony of Mr. Edrem, that's when he
4 came in, there was a fan blowing on an open wall, and why
5 wouldn't you do that? Mr. Edrem testified and Mr. Rodriguez
6 testified because it could spread mold throughout the house.
7 Mr. Edrem also testified that mold can form in 48 hours, and
8 that he didn't know how much had formed sooner or later, and
9 that goes to causation. If they can't prove their case,
10 then you're allowed to consider that in whether they were
11 damaged or the amount of those damages, the value. It was
12 discussed by Mr. Rodriguez that there was a big hole that
13 was knocked out, and that Mr. Smith had even suggested that
14 he was using a hammer and when you talk to Mr. Edrem, he
15 confirmed that there was a hole in the balcony. He didn't
16 know how long it was there. He couldn't tell whether there
17 was water intrusion or damage at all. You can consider it
18 in the facts that is part of this case.

19 Let me suggest -- let me go into further damages.
20 So you have a summary of damages sheet. There's a couple of
21 big repairs that are related to both mold and to the
22 balconies.

23 Based upon the fact that there was a handyman going
24 around and doing things that they couldn't clean up -- they
25 couldn't show what caused these damages.

1 Let's talk about after the sale happened and what
2 they bear out. I would assert to you that what really
3 occurred based on the testimony, after the sale they looked
4 around and there were other issues. Issues that my client
5 didn't know about, that they only found out after they
6 started going through walls and seeing things.

7 They paid \$560,000 dollars for this house in cash.
8 And they never had an inspection. And so buyers remorse
9 formed. And they wanted to blame someone other than
10 themselves. The buyers are two sophisticated individuals
11 who owned a company, Mr. Mahony's a COO and they could
12 afford to pay the \$560,000 in cash. They're smart people.
13 They're smart people. And what do they think? Well, Mr
14 Rodriguez is a certified building contractor. He knew
15 that's the way we can use this. That's the way we can get
16 our house fixed. We could blame him. We could say that he
17 knew and hire a lawyer and fancy experts, and with their
18 resources to speculate, but it all goes under this one
19 topic. That he should have known. That's the whole case,
20 an extravagant display to show that Mr. Rodriguez should
21 have known, but you heard his testimony, we went through
22 each and every thing, and he told you what he knew. You
23 heard the testimony about how they acted before and
24 afterwards. He didn't run away like people who are guilty
25 of concealing do.

1 What I assert based upon the testimony of the
2 experts and based upon the testimony of the Mahonys and the
3 Rodriguez's is that there were issues that no one knew about
4 and that they occurred and people saw them afterwards and
5 they needed someone to blame and so they looked at Mr.
6 Rodriguez as a scapegoat. But I told you in the beginning
7 the same thing. The most important fact that needs to be
8 decided is whether Mr. Rodriguez told them what he knew, and
9 that's all that was required under the law, not what he
10 should have known, not whether he could see through walls,
11 or that he's the greatest contractor that ever lived and
12 knows everything. It's what he knew. If you find that he
13 didn't know, if you find that he told them everything that
14 he knew, then look at your verdict form, and that first
15 question is going to be whether Mr. Rodriguez misrepresented
16 -- committed fraudulent misrepresentation. And that if he
17 told them everything that he knew, then you just check no,
18 and you hand the verdict form to the judge, and that's what
19 we're asking you to do in this case.

20 And thank you for your service her today.

21 THE COURT: Ten minutes. Rebuttal.

22 MR. KELKS: First of all, let's talk about buyers
23 remorse. Using reason and common sense, do you think that
24 someone would be remorseful that if someone told you that a
25 house that had \$83,000 worth of damages made everybody using

1 reason and common sense should come to that same conclusion.
2 Yeah. Why would somebody want a house that had \$83,000 in
3 damage. Why would somebody want to overpay \$83,000 for a
4 damaged house. You know, an interesting point was made by
5 Mr. Soto that, why would they want to live in a house with
6 mold. A better question, why did they get out of the house,
7 to get away from the mold. This was a process that would be
8 known by a certified residential contractor, not should have
9 known, it was known. And there has been no testimony
10 offered by the defense to establish one way or the other.
11 This is not the type of damage that a certified residential
12 contractor should have known about. No testimony by the
13 defense was offered to support the contention that a
14 certified residential contractor like Mr. Rodriguez is
15 didn't know there was a problem.

16 MR. SOTO: Objection. Mischaracterizes the
17 testimony.

18 THE COURT: Sustained.

19 MR. KELSKY: Should the Mahonys be punished for
20 buying a nice house. Haven't they already been punished
21 enough by the \$83,000 that they had to pay. You heard over
22 and over again, this is a beautiful house. It was a
23 luxurious house, one-of-a-kind house, they were in
24 foreclosure. These are unfortunate things that they were in
25 foreclosure. That's not the Mahony's fault. They didn't

1 put them into foreclosure. They bought a house. They
2 bought a house where representations were made regarding its
3 quality. There were misrepresentations. Thy relied upon
4 that misrepresentation. They suffered \$83,000 in damages,
5 and as a result of those misrepresentations, what you heard
6 were are discretions designed to conceal the facts. There
7 was rotted construction in this home.

8 Everything you heard, Larry Smith did this, I have
9 to repeat myself that Rick Edrem got there on that witness
10 stand and told you, Larry Smith did nothing, and the work
11 that he did do outside of the deck and everything was at my
12 direction. He never said that there was airborne mold.
13 Does this look like airborne mold? Does this look like
14 airborne mold? Does that look like airborne mold? Does
15 that look like airborne mold? You heard the testimony that
16 this condition had been there for years. Larry Smith was
17 there for a few days. Do you think Larry Smith caused all
18 of this damage? Does that look like damage that occurred in
19 a day? Common sense and reason, that's what you're allowed
20 to use, common sense and reason, would common sense and
21 reason lead you to believe that a person who made a small
22 hole in the drywall on one area of the house caused all of
23 that damage?

24 Members of the jury, the defense based its
25 predicate on asking you to buy into the same set of facts

1 that were concealed from the Mahonys. The overwhelming
2 evidence, the overwhelming competent and substantial
3 evidence shows that the Rodriguez's knew of the problem
4 affecting their home. They made statements to the Mahonys
5 that they relied upon.

6 I thank you for your time over the past two and a
7 half days going into three days. I know it's a lot to ask
8 of people to give up their time to serve as jurors. We ask
9 for your verdict. We ask you to award damages to the
10 Mahonys. Thank you for your time.

11 THE COURT: Members of the jury, you have now heard
12 and received all of the evidence in this case. I am now
13 going to tell you about the rules of law that you must use
14 in reaching your verdict.

15 You will recall at the beginning of the case, I
16 told you that if at the end of the case I decided that if
17 different laws apply, I would tell you. These instructions
18 that I'm about to give you are slightly different from what
19 I gave you at the beginning, and it is these rules of law
20 you must follow.

21 When I finish telling you about the rules of law,
22 the attorneys will present their final argument, and you
23 will then retire to decide your verdict.

24 Deputy, will you hand each of the jurors a set of
25 instructions?

1 If you'd like to follow along, I'm starting now on
2 the second page.

3 The claim in this case is as follows: The
4 plaintiffs' claim that the defendant fraudulently
5 misrepresented the condition of the home they sold to
6 plaintiffs resulting in damages sustained by plaintiffs.
7 The plaintiffs must prove their claim by the greater weight
8 of the evidence. I will now define some of the terms you
9 will use in deciding the case.

10 Greater weight of the evidence means a more
11 persuasive and convincing force and effects of the entire
12 evidence in the case.

13 The issue for you to decide on issues claimed for
14 fraud and misrepresentations are: First, whether the
15 defendant made a false statement concerning material facts.
16 Second, whether defendants knew the statements were false.
17 Third, whether the defendants intended that another would
18 rely on the false statements. Four, whether plaintiffs
19 relied on the false statement, and if so, fifth, whether the
20 false statements was a legal cause of damage to plaintiffs.
21 Plaintiffs may rely on false statements, even though its
22 falsity could have been discovered if plaintiffs had made an
23 investigation. However, plaintiffs may not rely on false
24 statements if they knew it was false, or its falsity was
25 obvious to them.

1 If the greater weight of the evidence does not
2 support the plaintiffs claim, your verdict should be for the
3 defendants on this claim.

4 If you find for the defendants, you will not
5 consider the matter of damages, but if you find for the
6 plaintiffs, you should award plaintiffs an amount of money
7 that the greater weight of the evidence shows will fairly
8 and adequately compensate plaintiffs for the following:
9 One, the difference between the actual value of the property
10 and its value had the alleged facts regarding is true or the
11 difference between the purchase price -- let me restate it I
12 misread it. The difference between the actual value of the
13 property and it's value had the alleged facts regarding it
14 is true, or the difference between the purchase price and
15 the actual value of the property at the time the fraud was
16 discovered.

17 In deciding this case, it is your duty as jurors to
18 decide the issues and only those issues that I submit for
19 your determination.

20 You must come to an agreement about your verdict.
21 Your agreed upon answers to my questions are called your
22 jury verdict.

23 The evidence in this case consists of the sworn
24 testimony of the witnesses, all exhibits received in
25 evidence and all facts that were admitted or agreed to by

1 the parties.

2 In reaching your verdict, you must think about and
3 weigh the testimony and any documents, photographs, or other
4 material that has been received in evidence.

5 You now can consider any facts that were admitted
6 or agreed to by the lawyers. Your job is to determine what
7 the facts are. You may use reason and common sense to reach
8 conclusions. You may draw reasonable inferences from the
9 evidence, but you should not guess about things that were
10 not covered here, and you must always apply the law as I've
11 explained them to you.

12 Let me speak briefly about witnesses. In
13 evaluating the believability of any witness and the weight
14 you will give the testimony of any witness, you may properly
15 consider the demeanor of the witness while testifying, the
16 frankness or lack of frankness of the witness, the
17 intelligence of the witness, any interest the witness may
18 have in the outcome of the case, the names and opportunity
19 the witness had to know the facts about which the witness
20 testified, the ability of the witness to remember about
21 which the witness testified and the reasonableness of the
22 testimony of the witnesses, consider in the light of all of
23 the evidence in the case, and in the light of your own
24 experience and common sense.

25 You've heard opinion testimony and certain

1 technical subjects from persons referred to as expert
2 witnesses. You may accept such opinion testimony, reject
3 it, or give it the weight you think it deserves, considering
4 the knowledge, skills, experience, training, or education of
5 the witness, the reasons given by the witness or the opinion
6 expressed and all of the other evidence in this case.

7 That is the law that you must follow in deciding
8 this case. The attorneys for the parties will now present
9 their final arguments, and when they're through, I will have
10 a final instruction regarding your deliberations.

11 Any objections to the instructions that were read
12 to the jury. Plaintiff?

13 MR. KELSKY: No, Your honor.

14 THE COURT: Defendant?

15 MR. SOTO: No, Your Honor.

16 THE COURT: Any additional instructions requested
17 from the plaintiff?

18 MR. KELSKY: No, Your Honor.

19 THE COURT: Defendant?

20 MR. SOTO: No, Your Honor.

21 THE COURT: At this time you're going to retire to
22 deliberate. I am going to advise at this point though that
23 prior to the selection of the jury, there is a juror that is
24 sitting here as an alternate. One of you was selected to
25 serve as an alternate. And that seat was decided before the

1 jury was selected, juror number 454, you were selected to
2 serve as the alternate in this case. You will not be
3 participating in the deliberations. Okay. I want to thank
4 you and make sure you understand the importance of an
5 alternate juror. Alternates are routinely selected, and
6 they are particularly important because it happens at times
7 and more than you may know that a juror on the main panel
8 becomes ill, has a personal issue that prevents them from
9 coming to court one of the days at trial, perhaps something
10 retains them or keeps them late, that is part of the trial.
11 Because all jurors must hear all of the evidence at the same
12 time, if that happens, and you didn't have an alternate,
13 we'd have to retry the entire case. By having an alternate,
14 it allows us to continue the case if something happens to
15 one of the jury members. So I'm going to ask that you
16 remain in the courtroom, I'm going to give you further
17 instructions, and at this time the remaining juror can
18 retire to begin your deliberations.

19 It will take us just a few minutes to get the
20 exhibits together and the verdict form.

21 I want to thank you for the time that you have
22 given us. I watched the jurors closely, and I know you were
23 paying close attention. You were here on time and ready to
24 go. It's really because of citizens like you, that make our
25 justice system work. I want to thank you for the important

1 position and role you played during this trial. We're going
2 to give you a certificate, and do you have any personal
3 belongings in they jury room?

4 ALTERNATE JUROR: No.

5 THE COURT: You have everything with you. If
6 you'll put your notes in the packets, and those will stay
7 here and your notepads and your notes, just put those in
8 your brown packet.

9 (A recess was taken.)

10 (The proceedings resumed as follows:)

11 THE COURT: Members of the jury, have you reached
12 a verdict?

13 THE JURY: Yes.

14 THE COURT: If the foreperson would please fold
15 the verdict in half and hand it to the court deputy.

16 Madam Clerk, would you please publish the verdict?

17 THE CLERK: In the Circuit Court of the Ninth
18 Judicial Circuit in and for Orange County, Florida, John
19 Mahony and Diane Mahony, Plaintiff, versus Jamie Rodriguez
20 and Maria Rodriguez, case number 2011-CA-16841, we, the
21 jury, return the following verdict. Did the defendants
22 misrepresent the condition of the home, yes. What is the
23 amount of damages sustained by plaintiff as a result of the
24 misrepresentation made about the home? Dollar amount,
25 \$78,128.87, so way we all, the 30th day of July 2014, Alyssa

1 Redberry, foreman or woman.

2 THE COURT: Are there issues that either party
3 would like to address before the jury is released?

4 MR. KELSKY: No, Your Honor.

5 MR. SOTO: No, Your Honor.

6 THE COURT: Ladies and gentlemen, on behalf of the
7 parties, the lawyers, and the people in the State of
8 Florida, I want to thank you for your time and consideration
9 of this case. And I also want to advise you of some very
10 special privileges enjoyed by jurors. No juror can be
11 required to talk about the discussions that occurred in the
12 jury room except by a court order.

13 For many centuries our society has relied upon
14 juries for consideration of difficult cases. We have
15 recognized for hundreds of years that a jury's
16 deliberations, discussions, and votes should remain their
17 private affair as long as they wish it. Therefore, the law
18 gives you a unique privilege to not speak about the jury's
19 work.

20 The lawyers and their representatives are not
21 permitted to initiate communications about the trial.
22 However, you may speak to the lawyers or anyone else about
23 the trial. You also have the right to refuse to speak with
24 anyone. A request may come from those who are simply
25 curious or from those who might seek to find fault with you.

1 It will be up to you to decide to preserve your privacy as a
2 juror.

3 That's your last official instruction. I would
4 like to personally thank you all of you on behalf of all of
5 the parties, court personnel, and the other citizens of the
6 State of Florida specifically your service in the Ninth
7 Circuit in Orange County Florida for the service you
8 performed as a citizen in allowing our system of justice to
9 move forward and truly it's only because of citizens like
10 you who were willing to fulfill their jury service.

11 So thank you, with this, you are officially
12 released from your jury service. I'm going to meet you back
13 in the jury room, and we'll hand you your certificates
14 there.

15 Court is in recess.

16 (Proceedings concluded at 1:33 p.m.)
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1 CERTIFICATE OF REPORTER

2 STATE OF FLORIDA

3 COUNTY OF ORANGE
4

5 I, SUSAN MULLEN, Court Reporter, certify that I
6 was authorized to and did stenographically report the
7 proceedings had at the time and place herein, and that the
8 transcript is a true and complete record of my stenographic
9 notes.

10 I FURTHER CERTIFY that I am not a relative,
11 employee, attorney, or counsel of any of the parties, nor am I a
12 relative or employee of any of the parties' attorney or counsel
13 connected with the action, nor am I financially interested in
14 the action.

15 Dated this the 22nd day of October, 2015.

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18 SUSAN MULLEN
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